Greece - Decision No 428/V/2009 of the Greek Competition Commission

Greek Competition Commission fines the Piraeus Port Authority and Mediterranean Shipping Company for breach of Articles 1 of Greek Law 703/1977 and 81 EC – A bizarre competition analysis.

VERA LAZARIDI*

ABSTRACT

This case note examines a complaint filed with the Greek Competition Commission (GCC) by two local carriers against the Piraeus port operator (PPA) for abuse of dominance in breach of articles 82 EC and 2 of Greek Law 703/1977, which was subsequently expanded to cover a prohibited collusion between PPA and MSC, an international carrier and important customer of PPA for port services, in breach of articles 81 EC and1 of Greek Law 703/1977 on the basis of a contract between them contemplating services offered to transhipment cargo. The GCC found a prohibited vertical collusion by way of anticompetitive effect and fined both PPA and MSC.

I. FACTUAL BACKGROUND

The Piraeus Port Authority S.A. ("**PPA**") is an entity controlled by the Greek State, which by law holds 51% of its shares. The port serves both as a hub for transhipment cargo (i.e. cargo destined for onward carriage by ship to other ports in Greece or in other countries) and as final destination for local cargo. PPA aims at serving the public interest, operates under the rules of private enterprise and enjoys administrative and financial independence. PPA has been granted a series of exclusive rights (*de lege* monopolies), namely, to use and exploit the infrastructure (including its construction and maintenance) of the shore and sea zone of the Port of Piraeus until 2042[1]; to exploit the Container Terminal ("**SEMPO**"), i.e. the area where PPA keeps the infrastructure and personnel for servicing containers; and to offer services to all kinds of ship-transported cargo[2].

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* LL.B. (Athens), LL.M. (London), Counsel (*Karatzas & Partners Law Firm*). The views expressed in this paper are strictly personal and should not be regarded as stating any position of the Karatzas & Partners Law Firm.

[1]This exclusive right arises from a concession Agreement dated 13.02.2002 with the Greek Republic.

[2]The GCC pointed out in its introductory remarks that PPA, being an undertaking to which exclusive rights have been granted, has a special responsibility towards the users of the port in its dual role as the entity responsible for the management and development of the port and as the provider of port services, whereby it holds a legal monopoly. The special responsibility of PPA translates into not discriminating unjustifiably between the users of the port; moreover, its discretion to enter into special agreements with shipping companies must be exercised with a view towards balancing the handling of transhipment and local cargo, i.e. if transhipment cargo is handled on special terms, local cargo must not be adversely effected (See 94/19/EC: Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - *Sea Containers v. Stena Sealink* - Interim measures) OJ L 015, 18/01/1994, pp. 8-19 para 75 et seq.).

Mediterranean Shipping Company S.A. ("**MSC**") is a company active in the business of international container carriage, being the second largest carrier globally. PPA and MSC entered into Contract 71/2001 and its amendment, Contract 59/2002, with a ten-year duration (the "**Contract**"), whereby the parties stipulated a special regime for the provision of transhipment cargo services including the following: priority service to the MSC's vessels at the facilities of PPA in accordance with pre-determined tariffs, observance of particular specifications for performance/productivity and the safeguarding of MSC's rights deriving from the contract[3]. Indicatively, tariffs with substantial discounts apply for services relating to transhipment cargo (moves in transit, storage in transit and siftings) vis-_-vis MSC, which are lower than the charges for transhipment cargo services to third users. MSC in return undertakes the obligation to handle through SEMPO a volume of transhipment cargo which amounts to approximately 500,000 moves per annum. It is expressly agreed that MSC vessels carrying transhipment cargo will be served by priority in terms of berthing, provision of necessary means and personnel for loading/discharge, conduct of loading/discharge operations and for the shifting of cargo to and from stacking areas.

II. CLAIMS

Two Greek undertakings, competitors of MSC, SARLIS S.A. and SARLIS & ANGELOPOULOS LLP lodged a complaint with the GCC in May 2004 stating that PPA abused its dominant position in the market for services related to the port infrastructure

[3]In particular, it was agreed that in case of services similar to those agreed in the Contract being rendered at any time in the future at the area of SEMPO either by PPA or a third party at lower charges than the current ones for both types of cargo, the MSC tariffs will be adjusted accordingly. Furthermore, PPA undertook the "*moral obligation*" during the term of the Contract not to grant to other shipping companies any privileges or tariff adjustments which are disproportionate compared to the Contract itself.

under Articles 2 of Law 703/77[4] and 82 EC due to the (i) imposition of unfair trading conditions to the users of the Container Terminal (SEMPO), (ii) application of dissimilar terms to equivalent transactions, and (iii) limitation of the movement of containers to and from the port of Piraeus causing damage both to the port users and the end-customers (consumers). The complainants, in their supplementary memoranda in November 2004, raised the issue of cumulative application to the initial complaint of Articles 1 of Greek Law 703/1977[5] and 81 EC due to prohibited collusion between PPA and MSC. The extension of the complaint against PPA and MSC concerned (i) the stipulation of terms in the Contract limiting the ability of PPA to freely negotiate the entering into similar agreements on the provision of privileges to third party competitors of MSC and (ii) the stipulation of performance terms regarding port productivity which effectively prevent a functional and profitable service to all other users. As a consequence, the Contract was allegedly identified with a prohibited vertical collusion.

The General Directorate of Competition ("**GDC**") of the Greek Competition Commission ("**GCC**") submitted to GCC a report in relation to the application of Article 2 of Law 703/77 and Article 82 EC as regards the PPA practices, reserving itself to revert with a fresh report after having examined the Contract in the context of Articles 1 of 703/77 and 81 EC. The supplementary report was submitted on 09.08.2006 and both reports were subsequently consolidated into a single one with proposals. The case was heard in fifteen sessions of the GCC Plenary and the decision was issued on 23rd January 2009.

III. The assessment

The GCC first examined the alleged breach of Articles 1 of Greek Law 703/1977 and 81 EC, to continue with the possible breach of Articles 2 of Greek Law 703/1977 and 82 EC.

[4] The content of which reiterates the text of Article 82 EC referring to the national market and the corresponding effect on trade.

[5] The content of which reiterates the text of Article 81 EC referring to the national market and the corresponding effect on trade.

Prohibited collusion – Article 1 of Greek Law 703/1977 and Article 81 EC

The GCC identified the Contract as a vertical agreement[6] between undertakings which are active at different business levels, falling within the scope of application of Article 1(1) of Greek Law 703/1977 and 81(1) EC. According to the case law of the European Court of Justice (ECJ) on Article 81 EC, competition may be distorted not only by agreements limiting competition between the undertakings concerned, but also by agreements prohibiting or limiting competition between one of the interested parties and third parties[7]. The same applies for Article 1(1) of Greek Law 703/1977. This is particularly the case when, through an agreement, the parties are trying, by excluding or limiting competition on the part of third parties on services, to impose or establish an unjustified advantage to their benefit and to the detriment of consumers, something that would be contrary to the general underlying aims of Article 81 EC.

As regards the application of the Block Exemption Regulation (BER) 2790/1999[8], the GCC found that PPA has the monopoly in providing port services to the cargo handled through the port of Piraeus and in providing access to its harbor facilities, concluding that it has a market share far in excess of 30% in the relevant market for the provision of port services to local cargo in Central and Southern Greece to which the Contract is relevant. Thus, PPA was found to fall outside the scope of the presumption of legality on the basis of Article 3(1) of BER 2790/1999. The GCC argued further that the provisions of the Contract which secure servicing by way of priority and performance obligations, as described above, constitute "quantity forcing" on the supplier, PPA, in which case the market share of the buyer is examined in relation to the 30% threshold (article 3(2) of BER 2790/1999). In this case the Contract would not qualify for exemption as well, given the market share of the buyer, MSC, which holds a dominant position in the market for carriage of local cargo containers. The GCC held that even if BER 2790/1999 applied, the block exemption benefit would be withdrawn (as proposed by the GDC), since the Contract in question produces results which are incompatible with Article 81(3) EC in the area of

[6] See the Guidelines on Vertical Restraints of the European Commission, OJ 2000/C291/01, para 229.
[7] See Joined cases 56 and 58/64 *_tablissements Consten S._.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299.
[8] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, O J L 336 , 29/12/1999 pp. 21-25.

southern/central Greece which constitutes a self contained market (i.e. the contract does not contribute to the improvement of production or of distribution of goods or to the promotion of technical or financial development and it does not at the same time grant to consumers a fair share of the benefit reaped). Upholding that view, GCC moved on with a full assessment under Articles 1 of Greek Law 703/1977 and 81 EC accordingly.

The GCC unanimously concluded that the object of the contract was not abusive, as there was no intention of the parties ex ante to foreclose the rest of the SEMPO users. For the purposes of examining any anticompetitive effects of the Contract, the GCC focused on a "package" of services granting priority of service to MSC for transhipment cargo (priority in berthing, means and personnel for loading/discharge, conduct of loading/discharge, provision of stacking space for transhipment cargo, shifting transhipment cargo from stacking areas). The GCC observed that throughout the relevant period the port of Piraeus had reached a point of saturation where, in terms of capacity (facilities/equipment/personnel), it failed to meet all users' demand for operations concerning both local and transhipment cargo at that time. As a result of the application of the Contract, PPA undertook disproportionate obligations vis-_-vis MSC, which resulted into the defective servicing of other users[9] and their further exclusion from the market of container carriage of local cargo and transhipment cargo through Central and Southern Greece. Thus, the contractual terms resulted into (i) inability of the users of port services carrying local cargo to compete on equal terms with MSC at the local cargo market, with a further impact on effective competition (since the financial freedom of both PPA and third party carries (existing or potential) was prejudiced) and (ii) foreclosure of the market and creation of high barriers to entry for potential newcomer MSC competitors either in transhipment or in local cargo[10]. Quite interestingly, at this point of its assessment, GCC identified two separate markets, one for local cargo and one for transhipment cargo, observing that they were connected to the extent that MSC carried mixed cargo on its vessels, which effectively meant that the local cargo of MSC, to which the special regime contemplated in the Contract would not apply, enjoyed de facto preferential treatment when carried together with transhipment cargo, "*thus, the treatment reserved by PPA vis-_-vis a customer who is active primarily in the market of transhipment cargo, cannot be separated from the impact it may have on the market of local cargo*".

By a majority of 6-5 the GCC ruled that the companies breached Articles 1(1) of Greek Law 703/1977 and 81 EC by way of a prohibited collusion having as effect the prevention, limitation or distortion of competition, in particular by limiting and controlling production and distribution through the application of dissimilar conditions to equivalent transactions against other trading parties which were placed in a disadvantageous position in competition.

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[9]Indeed, by applying dissimilar conditions to the provision of equivalent port services to users, a change was marked on the market conditions of the specific commercial sector, leading to the absence of actual or potential competition.

[10]The priority servicing together with commitment of the port infrastructure in an unequal manner in favour of MSC resulted into delays of work and increase of the operational costs of other users, depriving them of the opportunity to achieve economies of scale and thus weakening their position in the market. As regards the weigh between the anti-competitive effects and any advantages potentially reaped, based on a rule of reason approach, the GCC noted that the attracting of transhipment cargo into the port of Piraeus can be achieved with less burdensome consequences for the rest of the users of the port As additional effects the GCC marked the increase of the market share of MSC in both local and transhipment cargo and the simultaneous decrease of the market share of other carriers.

The minority opinion, on the contrary, noted that the complaint was unfounded for the following reasons: Preferential treatment entails applying dissimilar conditions to equivalent transactions and in this case the transactions were not equivalent. Taking an economic-based approach, the minority of the GCC explained that by virtue of the Contract governing the terms of transhipment services, MSC offered to PPA –contrary to the rest of the SEMPO users- additional prestations/benefits, namely (i) guaranteed minimum cargo, (ii) long-term commitment (iii) scheduled calls and (iv) increased productivity due to the size of ships. Precisely because of the fact that the two separate product markets are interrelated, the benefits offered by MSC in the market of services to transhipment cargo were passed on to the local cargo market as well, to the extent local cargo was carried together with transhipment cargo. Consequently, as the GCC minority concluded, "*the prestations/benefits from MSC regarding local cargo are dissimilar to those offered by the rest of the users and have a measurable financial value for PPA […] if the user of the port offering additional prestations/benefits does not enjoy privileges proportionately, then such user would run the risk of less favourable treatment compared to the rest of the users*"[11]. The minority opinion underlined the failure of the majority to analyze the value of the additional benefits, while not arguing at the same time that such value is zero or negligible. In the opinion of the GCC minority, the rapid increase of the MSC market share was compatible with the market conditions as well as with the general development of MSC during the period in question.

Abuse of dominance – Article 2 of Greek Law 703/1977 and Article 82 EC

Pursuant to the ECJ case-law, an undertaking holds a dominant position in the meaning of Article 82 EC, when it enjoys a legal monopoly for the supply of certain services[12]. GCC found that PPA, by holding a legal monopoly in the market for port services at the Port of Piraeus (in its dual capacity as entity responsible for the port management and provider of port services), constitutes a mandatory commercial partner to the other port users thereby securing for itself the independent behaviour which characterizes the existence of dominance[13]. However, with regard to the provision of port services to the international container carriers who are active in the carriage of transhipment cargo, the port of Piraeus is potentially interchangeable with approximately 20-30 other ports in the Mediterranean and therefore Piraeus does not hold a dominant position in that relevant market and has a market share of approximately 10%. On the contrary, Piraeus was found dominant in the market of local cargo services as there was almost zero interchangeability with other ports of the Mediterranean, with the Port of Piraeus being the most advantageous (primarily in terms of cost of carriage) with regard to the carriage by sea of cargo destined to or shipped from the area of Central and Southern Greece. GCC moved on to examine abuse of its dominance in the market of local cargo services.

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[11]The GCC found that from the effect of the contract (for the period 2002-2005) it is derived that the local cargo of MSC amounted on average to a proportion of 20% of its total cargo handled through Piraeus, which corresponds to a proportion of 37% of the total local cargo throughput at the port. According to the GCC minority it was self-evident that the user who provides 37% of the turnover of a business (such as increased productivity due to the economies of scale and the scheduled calls) may benefit from proportionate privileges, this being particularly so when the privileges, as a result of simultaneous presence of both types of cargo are in tandem and either decrease or increase in a linear proportion with the additional prestations/benefits.

[12]See Case 311/84 *Telemarketing* [1985] ECR 3261.

[13]See Case T-83/91 *Tetra Pak International* SA [1994] ECR II-755.

The majority of the GCC concluded the examination of the abuse of dominance in the market of services to transhipment cargo by stating its full agreement with the GDC report regarding abuse and effect on trade[14]. After carrying on the relevant open voting, the majority opinion of the GCC resolved that in this case "*it was not proved in the earlier proceedings that there was an infringement of Articles 2 of Greek Law 703/1977 and 82 EC*".

The minority of the GCC, however, based on the same facts, found abuse of dominance of PPA according to Articles 2 of Greek Law 703/1977 and 82 EC in the market for services to local cargo (loading/discharge and storage), as PPA imposed unfair prices for the services provided. The pricing of PPA for loading/discharge services in the market of local cargo, where it holds a dominant position, was significantly higher than the pricing of loading/discharge services for transhipment cargo (which is a market where PPA faces intense competition from other Mediterranean ports) and such difference in pricing cannot be justified on the basis of cost, since it did not derive that there was any significant cost difference. The comparison between the throughput of the total volume of local cargo and of the total volume of transhipment cargo served throughout the relevant period reveals that a fair allocation of the cost on the basis of the moves required to serve both types of cargo[15] would render the average cost for local cargo service significantly lower. In other words, both services (offered during the same time period) required the same personnel and equipment, and had, in general, the same common cost, which should have been divided depending on the volume of cargo (moves) that each service requires. It was thus clear that PPA was charging excessively for the loading/discharge service of local cargo, an inelastic market in terms of demand, where it holds a dominant position, whereas it charges transhipment cargo with much lower prices on the basis of the competitive conditions in the market. Further, the examination of the storage services to both types of cargo (which were found exactly the same) revealed that the price for storing local cargo was considered excessive and PPA did not provide any evidence to the contrary.

In examining the effect on trade, the GCC minority argued that the saturation of the available storage space at SEMPO, which was a result of PPA abusing its dominance, forced carriers of local cargo to arrange for storage at private storage spaces and thus to pay excessive storage and transportation dues, thereby rendering them less competitive. The ultimate result of all this was an increase in retail prices to the detriment of consumers. According to the dissenting opinion of the GCC Plenary, the above highlighted abuse of dominance of PPA is clearly proved from the fact that following the lodging of the complaint by the complainants, measures were taken by PPA and there was some significant improvement in the operation of the port regarding the rest of the carriers. All the features presented above shaped, in the opinion of the minority of the GCC members, an abuse of dominance on the part of PPA under Articles 2 of Greek Law 703/1977 and 82 EC.

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[14]The consolidated report of the GDC (Report of February 12, 2007) characterized as abusive: (i) the grant of rebates by PPA to MSC on storage dues for transhipment cargo, as there was no objective justification to differentiate between those dues and dues for local cargo (constituting in essence the same service); (ii) the servicing of local cargo compared to transhipment cargo in whole (unfair prices); (iii) the priority in berthing and allocation of equipment taken together with the specifications that PPA committed to achieve vis-_-vis MSC, given that such conduct effectively amounted to constructive refusal to supply to other port users, the attraction of transhipment cargo not serving as objective justification in that regard. Moreover, GDC verified on the basis of relevant ECJ case-law that an infrastructure such as port or airport constitutes substantial part of the common market when due to the volume handled through it and its importance for trade there is possibility to substantially affect trade within the common market, in particular in terms of foreclosure. PPA was found to be part of the common market wherein effect on trade was noted on the part of GCC with regard to both Article 81 and 82 EC in accordance with the relevant guidelines (Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004/C 101/07)).

[15]Costs are calculated according to the performance of moves (i.e. lifting the cargo from the vessel, placing in on the docks, lifting it from the docks and placing it on the vessel etc).

IV. Fines

Finally, the GCC imposed fines taking into account the time period during which the anticompetitive behavior manifested itself in practice (i.e. from 01.07.2002 until, and including, 2004, noting that in any case, from the year 2005 onwards, the situation was significantly improved). The GCC weighted the criteria of the guidelines on fines noting that the infringement is imputable on both undertakings, as it cannot be argued that the unlawful practice is attributed exclusively to one of the two due to the fact that the other was financially weaker and thus had no leeway for negotiation. The GCC fined PPA with the amount of 1.280.197.43 Euros and MSC with the amount of 1,283,871.27 Euros (amounting to 1% of its turnover). The GCC pointed out that PPA bears a heavier liability compared to MSC given that, in its capacity as the entity managing the port, PPA was in a position to know and assess the exact conditions of operation and the capacity of the port. For this reason, according to GCC, PPA constituted the only operator who could have remedied the problems and inefficiencies occurred in the relevant market, something that it actually did from 2005 onwards.

V. Comment

The above legal assessment may strike the impression on the reader that, when looking at the majority and minority opinions separately, two different cases were heard, based on the same facts and excluding one another. The first seems to be an Article 81 case, a clear collusion between PPA and MSC which has an anti-competitive effect on the national and Community market for services to local cargo, in which case no abuse of dominance concerns arise. Nevertheless, few remarks with regard to the methodology of the GCC analysis are pertinent.

In examining a potential exemption under BER 2790/1999, the GCC stated that PPA has the monopoly in port services provided to local cargo and was led to the conclusion that the 30% threshold does not apply, thus, a full assessment under Articles 81 EC and 1 of Greek Law 703/1977 had to be carried out. However, the 30% threshold under Article 3(1) of BER 2790/1999 refers to *the relevant market on which the supplier sells the contract goods or services*, that being the market of services to transhipment cargo, which is the subject-matter of the Contract and wherein PPA (the seller) holds a market share of less than 10% . What is more, it is indeed peculiar that the GCC majority found an exclusive supply obligation under Article 3(2) of the BER 2790/1999, something that does not seem to fit the background of the case, as the Contract did not contemplate such an exclusive obligation.

[16] The GCC rested on the premise that the results of the Contract, which refers to the market of services to transhipment cargo, reflect on the market of services to local cargo, because local cargo occasionally benefits from the Contract terms when carried together with transhipment cargo. It could be argued, however, that this fact alone is not sufficient to sustain the conclusion of the GCC that the local cargo market is indeed the relevant market affected by the Contract. On this basis, it could be further argued that there is a *de minimis* effect of the Contract, since the market share of both PPA and MSC does not exceed the 15% threshold in the transhipment market and the local cargo market was not adequately illustrated as a relevant market affected by the Contract (see para 7 (b) of the Commission Notice on Agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (*de minimis*) OJ 2001/C 368/07).

The GCC's argument that in any case, even if the agreement benefited from BER 2790/1999, the presumption of legality must be withdrawn[17] since "*the agreement in question produces results which are incompatible with Article 81 para 3 EC at least*" is not backed by the required economic-based analysis of the Guidelines on Vertical Restraints[18] in conjunction with paragraph 5 of the Guidelines on the application of Article 81(3) of the Treaty[19]. Moreover, according to paragraph 75 of the Guidelines on BER 2790/1999, a withdrawal decision can only have an *ex nunc* -and not an *ex tunc*- effect (i.e. the exempted status of the agreements concerned will not be affected until the date at which the withdrawal becomes effective). The period to which the infringement refers consists of the years 2002 – 2005, since it is expressly admitted in the text of the decision that the port conditions rendering the performance of the Contract unlawful were remedied by PPA after 2005.

The GCC majority, in its assessment of the anti-competitive effect of the Contract, identifies such effect as a direct result of the application of the Contract terms. In light of the absence of a meticulous analysis of the factors that need to be examined in case of an anti-competitive effect[20] and taking into account that the GCC admits in this same decision that the conditions producing such an anti-competitive effect (i.e. the saturation of the port) are mainly attributed to PPA, the finding of such anti-competitive effect seems to rest on a somewhat contradictory and unsafe legal foundation regarding causality.

The GCC majority evidently marks a disproportionate turn in argumentation when it reaches the examination of the case under Article 82 and sums up its assessment by way of reference to the GDC Report (which found abuse of dominance), denying that abuse of dominance can be proved by the earlier proceedings in question. However, elements pointing towards an Article 82 case are indeed present even in the argumentation of the GCC majority itself: The "special responsibility" of PPA within the framework of its dual role; the saturation of the port, which was not illustrated clearly as a direct effect of the Contract, but rather as a behaviour for which a port operator is unilaterally responsible in harmony with ECJ case law[21]; and, finally, the explicit acceptance by GCC that PPA met (unilateral) action to remedy such saturation after the period of examination in question as well as the verification of PPA's sole responsibility in that regard in setting fines[22].

[21]See C-179/1990 *Merci Convenzionali Porto di Genova Spa* [1991] ECR I-5889, paras 18-19, where the ECJ clearly qualifies the behaviour of a port operator imposing on persons requiring services unfair prices, or limiting technical development to the prejudice of consumers, or applying dissimilar conditions to equivalent transactions with other trading parties with an abuse of dominant position.

[22]The decision reads: "*PPA knew exactly the conditions of operation and the capacity of the port and was, as a result, the only one who could have remedied the relevant problems occurring*" tacitly admitting a unilateral conduct.